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No. 00-1826

IN THE

Supreme Court of the United States

AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA,
Petitioner,

v.

BELINDA ALEXANDER ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Mississippi

MOTION OF THE MISSISSIPPI MANUFACTURERS ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF FOR THE MISSISSIPPI MANUFACTURERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF THE MISSISSIPPI MANUFACTURERS ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2(b), the Mississippi Manufacturers Association ("MMA") hereby moves for leave to file the accompanying brief as an *amicus curiae* in support of Petitioner.[1]

The MMA is a nonprofit membership organization that was founded in 1951 to act as the voice of Mississippi industry. A major part of MMA's work involves representing the interests of Mississippi industry before the state and federal legislative

[1] Prior to filing this motion, MMA sought the consent of all parties to the filing of this brief, as required by Rule 37.2. The Petitioner consented. MMA had not received notification of consent from Respondents by the time the brief needed to be sent for final preparation.

and regulatory bodies, supporting measures that will benefit industry and opposing measures that impose unfair, costly, and unnecessary burdens. MMA currently has more than 1,800 members, representing all segments of the industrial community, including manufacturers, fabricators, processors, and distributors. MMA's membership also includes a wide array of allied business interests, such as banks, law firms, and consulting firms.

MMA and its members have several interests that will affected by the outcome of this case. First, mass joinders have frequently been employed in products liability cases in Mississippi. If this Court does not take the opportunity to limit the use of mass joinders, thousands more products liability claims will likely to filed in Mississippi. MMA's members include many manufacturers, distributors, and other entities who are potential defendants in such cases. Defending against this wave of litigation will impose serious costs and heavy burdens on Mississippi industry.

Moreover, MMA and its members have a strong interest in an efficient court system that is able to resolve the claims of Mississippi litigants in a fair and timely manner. If the Mississippi courts become a haven for out-of-state plaintiffs to pursue tort claims in Mississippi that have no discernible link to the state, the court system will quickly be overwhelmed. Other litigants, including MMA and its members, will face significant delays and prejudice. Finally, the costs of this wave litigation will ultimately fall on Mississippi taxpayers, and Mississippi industry will be forced to carry much of that burden.

For the foregoing reasons, the Mississippi Manufacturers Association respectfully requests that the Court grant its motion and permit the filing of the accompanying brief for the Mississippi Manufacturers Association as *amicus curiae* in support of Petitioner.

Respectfully submitted,

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BRIEF FOR THE MISSISSIPPI MANUFACTURERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE* [1]

The interest of the Mississippi Manufacturers Association ("MMA"), a nonprofit membership organization that was founded in 1951 to act as the voice of Mississippi industry, is set forth in the accompanying motion for leave to file this brief.

[1] No counsel for any party had any role in authoring this brief. No persons other than the *amicus curiae*, its counsel, and the Center for Claims Resolution (a coalition of companies who are regularly defendants in asbestos litigation) made any monetary contribution to its preparation or submission. Prior to filing this brief, MMA sought the consent of all parties to the filing of this brief, as required by Rule 37.2. The Petitioner consented. MMA had not received notification of consent from Respondents by the time the brief needed to be sent for final preparation and hence has filed the accompanying motion for leave to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is before the Court on petition for writ of certiorari, filed by the American Bankers Insurance Company of Florida (one of the defendants below), following the decision of the Supreme Court of Mississippi, in which that court affirmed several orders of trial courts in different counties that had permitted the joinder under Rule 20(a) of the Mississippi Rules of Civil Procedure of hundreds of individual claims. Nos. 98-IA-00046-SCT & 97-IA-01271 (Miss. Feb. 1, 2001) (Pet. App. 1a–28a).

Trial courts in Mississippi have permitted even more egregious mass joinders—some involving thousands of plaintiffs from outside Mississippi—in several products liability cases involving asbestos, tobacco, the diet drug fen-phen, and the contraceptive implant Norplant through loose application of Rule 20(a), despite that rule's "same transaction [or] occurrence" requirement. Mass joinders are responsible for a huge influx of litigation in Mississippi by out-of-state residents, because such joinders enable plaintiffs to circumvent Mississippi's venue and forum non conveniens rules. Thousands of out-of-state plaintiffs have already filed claims in Mississippi courts that should properly have been brought in their home states. Furthermore, mass joinders encourage forum shopping within Mississippi, resulting in a deluge of litigation in some of the smallest and poorest counties in the state. When hundreds or thousands of plaintiffs from different counties join together in a single action, they can choose to file an action virtually anywhere in Mississippi. As a result, some counties in Mississippi now have more litigants than they do residents. These mass joinders cannot be squared with the requirements of due process of law.

The Mississippi Supreme Court's decision applies the Rule 20(a) "same transaction [or] occurrence" requirement in a way that will encourage, rather than discourage, loose applications of that requirement and thus permits continuing violations of due process of law. Certiorari should be granted, so that a clear

message about the constitutional meaning and importance of the due process notions reflected in the traditional "same transaction or occurrence" requirement will be sent to the courts in Mississippi.

Mass joinders severely curtail the right of defendants to receive a fair and individual consideration of each plaintiff's claim, consistent with due process. In effect, mass joinders have been used in Mississippi much like class actions in other states—only without the procedural protections that are embodied in class action rules. Because of the huge number of individual issues that predominate in each case, mass joinders encourage trial judges to employ procedural shortcuts, such as severely curtailing discovery or scheduling mass trials of dozens of claims. Such measures aggravate the original problem, however, by encouraging more plaintiffs to file claims in Mississippi.

Furthermore, mass joinders can effectively eliminate a defendant's right to appeal adverse rulings, because plaintiffs can often delay issuance of a judgment by adding new claims, thus increasing potential liability until defendants are forced to settle. Even if a final judgment is entered, it may be impossible for a defendant to obtain the 125-percent-of-judgment bond required to stay execution, because complaints in mass joinder cases routinely seek damages of hundreds of millions of dollars.

For all of these reasons, further explained below, the Mississippi Manufacturers Association believes that the mass joinders in the instant cases are representative of a serious and growing due process problem in Mississippi. This Court should grant certiorari in order to clarify that due process of law does not permit unlimited joinder and that factually distinct claims arising from separate transactions or occurrences must be brought as separate actions.

ARGUMENT

I. Mass Joinders Have Become Epidemic in Mississippi.

Jefferson County—which is one of the smallest counties in Mississippi and is served by only one Circuit Judge, whom it shares with Claiborne and Copiah Counties—is home to an astonishing volume of litigation as result of mass joinders. At the time of a recent count, more than 10,000 plaintiffs had pending products liability claims—*more than the entire population of the county* (9,740 in the new census). Moreover, those cases involved substantial numbers of out-of-state plaintiffs: more than one-half of the 4,667 plaintiffs in *Noble* v. *E.H. O'Neil*, No. 98-0024, at least 760 and probably many more of the 3,464 plaintiffs in *Cosey* v. *E.D. Bullard Co.*, No. 95-0069, and more than three-fifths of the 895 plaintiffs in *Washington* v. *American Home Prods. Corp.*, No. 99-0035.[2] Only a handful of the plaintiffs in any of the cited cases had any apparent connection to Jefferson County. Nor was there any common factual thread that tied the plaintiffs' claims together. Instead, each case involved a large group of plaintiffs who alleged the same general types of injury and the same general legal theories, but under specific facts and circumstances that vary widely from one plaintiff to the next.

The situation was not unique to Jefferson County. Claiborne County, for example, had one case with more than 2,800 plaintiffs, *Hedrick* v. *Metropolitan Life Ins. Co.*, No. 98-0115, and one case with more than 1,100 plaintiffs, *Abner* v. *Westinghouse Elec. Corp.*, No. 98-0167.[3] A recent asbestos suit naming 990 plaintiffs (from twenty states) was filed in Jones County. *Foster* v. *Kansas City So. Ry.*, No. 2000-141-CV9.

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[2] *Cosey* was removed to federal court, No. 1:99CV164 (G)(R) (S.D. Miss.).

[3] *Hedrick* was removed to federal court, No. 1:00-485 (S.D. Miss.).

Fewer than a fourth of the plaintiffs lived in Mississippi, and only a small fraction in Jones County. Additional examples of such cases are cited in the Petition at 10–11.

Cases of this magnitude pose severe administrative burdens on courts and threaten to prevent other litigants from receiving a timely and efficient adjudication of their claims. In response, courts tend to take procedural shortcuts, such as scheduling mass trials of dozens of claims and severely curtailing discovery. Although such measures are intended to reduce a court's case load, they have a perverse effect. Ultimately, the parties that benefit the most from these shortcuts are the plaintiffs whose claims have the least merit. By limiting discovery and the ability for individualized consideration of these claims at trial, courts encourage more plaintiffs to flock to Mississippi in the hope of gaining a tactical advantage through the use of the mass joinder device. The net result is an increase in the volume of litigation in Mississippi, not a decrease, with the major portion of the increase resulting from out-of-state plaintiffs seeking to profit from misjoinder.

There is simply no justification for this deluge of litigation. Absent misjoinder, many of these claims could not even be brought in Mississippi, and they certainly could not all be concentrated in a few cases and filed in two or three of the poorest and least populous counties in the state.

The Mississippi Supreme Court's decision did not dispute the existence or magnitude of the types of mass joinder cases discussed above. Its ostensible view was that a correct application of Mississippi Rule of Civil Procedure 20 was all that was necessary to deal with the problem. As shown below, however, the Court's interpretation and application of Rule 20 to permit joinder in this case virtually guarantees that lower court's will continue down the path of misjoinder in mass tort cases, to the detriment of the due process rights of any defendants drawn into these suits.

II. Mere Connection to a Common Event or Alleged "Pattern of Conduct" Does Not Justify Joinder.

Ostensibly, under Mississippi Rule of Civil Procedure 20(a) as under the rules of most states, multiple plaintiffs may join together in an action only when two requirements are met. First, the plaintiffs' claims must arise out of the same "transaction, occurrence, or series of transactions or occurrences." Second, there must be some question of law or fact that will arise in the action which is common to all the plaintiffs. These requirements are meant to ensure that all the claims arise out of the "same litigable event." Comment to Miss. R. Civ. P. 20. See Pet. App. 10a, ¶ 19.

Joinder thus requires a significantly closer connection among plaintiffs' claims than does consolidation, which, under Mississippi Rule of Civil Procedure Rule 42(a) and the rules of most states, requires only "a common question of law or fact." Cases may be consolidated for trial or pre-trial purposes even if the transactional relatedness requirement is not satisfied. For example, it might have been possible to consolidate a limited number of the insurance fraud claims at issue in this case, so long as venue was proper for each individual claim, to resolve common questions of fact or law, such as whether the filed-rate doctrine in Mississippi barred plaintiffs' claims. Such claims cannot properly be joined in one case, however, if they do not arise from the same "litigable event."

A. The "Same Transaction or Occurrence" Standard is Not Satisfied When Multiple Plaintiffs Allege Injuries Arising at Different Times and Places.

The "same transaction or occurrence" standard has historically required that all the claims in an action arise from a "common nucleus of operative fact." See, *e.g.*, *Hall* v. *Corbin*, 478 So. 2d 253, 255 (Miss. 1985) (discussing "transaction or

occurrence" standard in context of pendent jurisdiction of circuit courts over equity claims). Although this standard does not require an absolute identity of the factual circumstances underlying each claim, it demands, at a minimum, a close logical relationship among the claims. Ordinarily, the test will only be satisfied when substantially the same evidence must be produced to support each plaintiff's claims, such that the plaintiffs "would ordinarily be expected to try them all in one judicial proceeding." *United Mine Workers of Am.* v. *Gibbs*, 383 U.S. 715, 725 (1966).

The "same transaction or occurrence" requirement is clearly satisfied when multiple plaintiffs allege different injuries arising from a single cataclysmic event, such as a train wreck or an explosion. See 4 *Moore's Federal Practice* § 20.05[2], at 20–36 (3d ed. 2000). It is likewise satisfied when one plaintiff claims a single injury resulting from separate but interrelated actions by different defendants. *E.g.*, *Kiddy* v. *Lipscomb*, 628 So. 2d 1355 (Miss. 1993) (plaintiff allegedly injured by the cumulative malpractice of two different physicians).

The "same transaction or occurrence" standard is not satisfied, however, where multiple plaintiffs allege different injuries suffered at different times and in different places, and are only the "same" in that each plaintiff claims injury from exposure to asbestos, tobacco, or use of some other product like fen-phen or Norplant. Federal case law interpreting Rule 20 of the Federal Rules of Civil Procedure provides a reliable guide to the due process concerns that should have constrained the interpretation of the identical provisions of Mississippi's Rule 20. The leading federal case, *Saval* v. *BL Ltd.*, 710 F.2d 1027 (4th Cir. 1983), firmly establishes that joinder is not appropriate simply because multiple plaintiffs allege similar types of claims or are operating under the same general legal theory. In *Saval*, the plaintiffs had each purchased Jaguar automobiles which developed certain types of defects that necessitated several repairs. The plaintiffs argued that the "same transaction or

occurrence" standard was satisfied because their cars had developed similar problems and because they had relied on common misrepresentations when they had purchased the cars and had received identical warranties. The *Saval* court rejected both these arguments. It held that a mere similarity of the problems that the cars developed was not sufficient to satisfy the same transaction or occurrence standard, given that the cars had been purchased at different times, had been driven differently, and had different service histories. *Id.* at 1031. The court explained that:

> "To accept appellants' argument would be to open the federal courts [through Rule 20] to every claim involving products purchased from large manufacturers, simply through the device of alleging that all consumers relied on the companies' advertising. Similarly, every purchaser of a given product could join with every other purchaser, even if the products suffered from different defects, on the basis that a common warranty was given as to each product." *Id.* at 1032.

Thus, even the presence of a single, overarching issue of fact that may be relevant to several claims is not sufficient to justify joinder of otherwise disparate claims.

Just as plaintiffs cannot all join together in one case because they all allege similar defects in their cars, they cannot all join together simply because all of their claims are rooted in exposure to or use of the same product. Courts have frequently rejected efforts to join multiple plaintiffs in one case in the context of products liability actions. For example, in *Abdullah* v. *ACandS, Inc.*, 30 F.3d 264 (1st Cir. 1994), the court rejected an effort to join 1000 plaintiffs together where the only factual link between their claims was that they all alleged maritime exposure to asbestos. Numerous other products liability

decisions have reached the same conclusion.[4] Likewise, outside the products liability context, courts have repeatedly held that plaintiffs who were injured at separate times in separate places cannot join together in one action, even where they assert claims under the same legal theory against a single defendant. For example, in *Demboski* v. *CSX Transportation, Inc.*, 157 F.R.D. 28 (S.D. Miss. 1994), the court rejected joinder of four plaintiffs who were injured in separate railroad crossing accidents. In *Grayson* v. *K-Mart Corp.*, 849 F. Supp. 785 (N.D. Ga. 1994), the court rejected the joinder of eleven age discrimination claims, where each plaintiff worked at a different branch store and different supervisors made the decision to discharge each plaintiff.[5] Courts have been especially critical of efforts to join

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[4] *E.g.*, *Insolia* v. *Phillip Morris Inc.*, 186 F.R.D. 547 (W.D. Wis. 1999) (rejecting joinder of three plaintiffs in tobacco litigation); *Alvarez* v. *Armour Pharm.*, MDL-986, No. 94 C 3587, 1997 U.S. Dist. LEXIS 13668 (N.D. Ill. Sept. 4, 1997) (joinder of more than 100 plaintiffs inappropriate where facts relevant to each plaintiff's claim would have to be proven separately); *Andreacchio* v. *Beech Nut Nutrition Corp.*, 31 Fed. R. Serv. 3d (LCP) 925 (E.D. Pa. 1995) (joinder of 25 plaintiffs inappropriate where each plaintiff developed "Nursing Bottle Syndrome" through use of several products from several distinct defendants at different time periods); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL No. 1014, 1995 U.S. Dist. LEXIS 10138 (E.D. Pa. July 17, 1995) (rejecting joinder where plaintiffs from many states received bone screw implants from different doctors at as many as 1000 different locations); *Aaberg* v. *ACandS Inc.*, 152 F.R.D. 498, 500 (D. Md. 1994) (rejecting mass joinder of asbestos plaintiffs similar to *Abdullah*); *Walsh* v. *Ford Motor Co.*, 130 F.R.D. 514 (D.D.C. 1990) (rejecting joinder of automobile owners on facts similar to *Saval*), *appeal dismissed*, 945 F.2d 1188 (D.C. Cir. 1991); *Hall* v. *E.I. Du Pont de Nemours & Co.*, 345 F. Supp. 353, 382–84 (E.D.N.Y. 1972) (joinder inappropriate where three plaintiffs were injured in separate incidents by blasting caps made by different manufacturers).

[5] *See also Anderson* v. *Phelps*, 655 F. Supp. 560 (M.D. La. 1985) (rejecting joinder in employment discrimination case where plaintiffs alleged same legal theory against defendant but worked in geographically isolated locations); *Smith* v. *North Am. Rockwell Corp.–Tulsa Div.*, 50 F.R.D. 515, 525 (N.D. Okla. 1970) (rejecting joinder of four plaintiffs in

hundreds or thousands of different parties in one action. *See e.g., Aaberg* v. *ACandS Inc.*, 152 F.R.D. 498, 500 (D. Md. 1994) (attempt to join 1,000 plaintiffs was a misjoinder "so plain on the face of the matter as not to require any oral hearing").[6]

B. The Decision of the Mississippi Supreme Court Invites Misjoinder in Mass Tort Cases, Where Defendants' Due Process Rights Will Be Impaired.

The decision of the Mississippi Supreme Court that the "same transaction or occurrence" test was met in this case was based on several assertions about the nature of plaintiffs' claims:

> "Each plaintiff has alleged the very same claims involving the same insurance policies. * * *
>
> "It is clear that all of the plaintiffs' claims arise out of the same pattern of conduct, the same type of insurance, and involve interpretation of the same master policy. All of the plaintiffs' claims are similar with the exception of the actual dollar amount charged on premiums." Pet. App. 11a, ¶¶ 21 & 22.

These assertions mischaracterized the nature of plaintiffs' claims and will therefore inevitably lead lower courts to conclude that the Mississippi court has effectively relaxed the joinder rule beyond recognition. It is undisputed that no plaintiff had an insurance policy with American Bankers. Instead, the

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discriminatory discharge case).

[6] *See also Nassau County Ass'n of Ins. Agents, Inc.* v. *Aetna Life & Cas. Co.*, 497 F.2d 1151, 1154 (2d Cir. 1974) (joinder of 164 defendants in case involving thousands of fraud transactions was "such a gross abuse of procedure" that dismissal was warranted); *Tele-Media Co.* v. *Antidormi*, 179 F.R.D. 75 (D. Conn. 1998) (rejecting joinder of 104 defendants for alleged unauthorized reception of television signals); *Movie Sys., Inc.* v. *Abel*, 99 F.R.D. 129, 130 (D. Minn. 1983) (rejecting joinder of 1795 defendants in 18 actions as "inappropriate wholesale litigation").

lender, Fidelity, had a master policy with American Bankers that insured Fidelity's own interest in the collateral and no other interest, and Fidelity charged each plaintiff a share of the cost of that policy. Accordingly, plaintiffs' claims *necessarily* arise from the representations and course of dealings between Fidelity and each plaintiff at the time that he or she entered into an *individual loan agreement* with Fidelity. Accordingly, while each plaintiff's claims "involves" the master policy obtained by Fidelity, it "arises" from each plaintiffs' separate loan transaction with Fidelity. Thus, each claim does not "arise" from the "same type of insurance," because no plaintiff was an "insured" under the master policy. And each claim does not "involve" (except perhaps peripherally) any interpretation of the master policy, because no plaintiff bases his or her claim, or could do so, on an alleged breach of the master policy (to which no plaintiff was a party).

At best, plaintiffs allege a common "pattern of conduct" by Fidelity in each of the different loan transactions with the plaintiffs, with some involvement or acquiescence by American Bankers. As shown above, however, it is clear that allegation of such a "pattern of conduct" is insufficient under joinder jurisprudence virtually anywhere but Mississippi.

Nor is it relevant that American Bankers "attempted to pursue an affirmative defense common to all plaintiffs" (Pet. App. 14a, ¶ 29, referring to the filed-rate defense). The "same transaction or occurrence" prong of the joinder rule requires more than one or more common issues of law or fact.

Contrary to the decision below, this is not a case in which it was appropriate to "liberalize" a rule of civil procedure "in order to better accommodate parties who are consequently shut out of the legal system." Pet. App. 9a, ¶18. Denying mass joinder shuts no one out, because individual plaintiffs can still litigate effectively by hiring a common counsel, joining those claims that

are properly joined, and consolidating those cases that merit consolidation.

As the dissent below correctly pointed out, it may be the case here that individual claims would have been appropriately joined in several different complaints, depending on such factors as "plaintiffs whose claims arose by dealings with the same local Fidelity office, common representations made to the plaintiff by Fidelity personnel, relevant time periods, circumstances of default, losses incurred, damages claimed, or other factors of like effect." Pet. App. 27a–28a, ¶ 62. Thus, the Court's expressed fear of the danger of "[h]aving 1,371 cases tried separately," with resulting "havoc in the trial courts and delay," Pet. App. 24a-25a, ¶ 54, is misplaced. Reversal here would not prevent joinder of cases that may properly be joined and does not prevent appropriate consolidation orders that may further reduce cost and delay.

Conversely, the Mississippi Court's apparent notion that "any prejudice or confusion [from mass joinder] can be remedied by a carefully drafted jury instruction," Pet. App. 11a, ¶ 21, ignores extensive lower court and appellate experience that demonstrates that jury instructions cannot remedy the prejudice and confusion that attend mass trials, no matter how carefully drafted those instructions may be.[7] To suggest that lower courts

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[7] See, *e.g.*, *Cain* v. *Armstrong World Industries*, 785 F. Supp. 1448, 1455 (S.D. Ala. 1992) (noting, in an asbestos consolidation of only 13 cases, that despite "cautionary instructions before, during and after the presentation of evidence," "joint trial of such a large number of differing cases both confused and prejudiced the jury"). See also *Malcolm* v. *National Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) (rejecting consolidation of 48 asbestos cases because jurors' need to "assimilate vast amounts of information" would lead individual issues to get "'lost in the shadow of a towering mass litigation'") (internal citation omitted); *In re Consol. Parlodel Litig.*, 182 F.R.D. 441, 447 (D.N.J. 1998) (denying consolidation of 14 tort cases because multiplicity of issues would "create a nightmare of jury confusion which would be prejudicial to [the parties]").

may appropriately attempt such trials invites immense disorder, unfair prejudice, and endless appeals.

III. Because Mass Joinders Have Serious Consequences, Joinder Requirements Must Be Construed and Applied in Light of Due Process Concerns.

The difference between joinder of multiple plaintiffs' claims under and consolidation of multiple claims for trial is not just a technical or academic distinction. Joining separate claims together in one action, rather than filing separate actions and consolidating them for trial, has several dramatic consequences that highlight the need for strict enforcement of the "same transaction or occurrence" rule.

A. Mass Joinders Nullify the Venue Rules and Encourage Forum Shopping by Out-of-State Plaintiffs.

Mississippi permits a plaintiff to sue a nonresident defendant either in the county where the cause of action accrues or in the county where the plaintiff resides. Miss. Code Ann. § 11-11-11. Where venue is good as to one defendant, it is good as to all defendants. See, *e.g.*, *Senatobia Cmty. Hosp.* v. *Orr*, 607 So. 2d 1224, 1226 (Miss. 1992). Miss. R. Civ. P. 82(c) takes this principle one step further by applying it to multiple *plaintiffs*. It provides that "[w]here several claims or parties have been joined, the suit may be brought in any county in which any one of those claims could properly have been brought." Thus, as the Mississippi Supreme Court acknowledged, where there are several plaintiffs joined together, an action may be filed in *any* county where *any* one of the plaintiffs resides so long as that plaintiff is suing at least one out-of-state defendant. Pet. App. 13a, ¶ 27.

As a result, if the joinder rule is not strictly enforced, Rule 82(c) becomes a powerful tool for forum-shopping. Plaintiffs

with roughly similar injuries can band together and choose to file their action in almost any county in Mississippi. The instant cases—each of which involves only a handful of plaintiffs from the county where the action was filed—are striking examples of this type of forum-shopping. Had the individual plaintiffs filed separate actions, they could not all have been consolidated within one county. Pursuant to Rule 82(d) and Miss. Code Ann. § 11-11-17, the court would have been required to transfer each claim to a county where venue was proper. Such transfer would have enabled a much more fair and efficient disposition of the claims, because they would have been distributed among several different courts and judges.

The potential for forum-shopping by out-of-state plaintiffs is even more troublesome as a general matter, even if, as the Mississippi court suggested, it may not have been significant in the cases below (Pet. App. 13a, ¶ 27). Ordinarily, when an out-of-state plaintiff sues an out-of-state defendant for injuries suffered out-of-state, no county in Mississippi is a proper venue. Such claims generally should be dismissed pursuant to the doctrine of forum non conveniens, which Mississippi recognizes. See *Shewbrooks* v. *A.C. & S., Inc.*, 529 So. 2d 557, 561 (Miss. 1988). There is a strong interest in having localized controversies decided at home, and deference to a plaintiff's choice of forum is less compelling when the plaintiff is not a resident of the forum state. *Missouri Pac. R.R.* v. *Tircuit*, 554 So. 2d 878, 882 (Miss. 1989). By joining the claims of non-Mississippi plaintiffs to those of Mississippi plaintiffs, despite the absence of any suitable relationship between those claims, plaintiffs can easily circumvent these rules.

The mass joinders in *Noble*, *Cosey*, and *Washington* provide a dramatic illustration of the potential for abuse of the venue rules by out-of-state plaintiffs. Together, these three cases involved at least 4,000 non-Mississippi plaintiffs. That figure alone is roughly equal to half the population of Jefferson County. Of course, the true number of out-of-state plaintiffs is

probably much higher. And if this Court does not put a halt to the mass joinder trend, thousands more foreign plaintiffs will undoubtedly flock to Mississippi.[8] While Mississippi may be prepared to put up with the severe burdens that this explosion of litigation will impose on its overburdened court system and on Mississippi jurors, plaintiffs who have a legitimate right to file claims in the state courts are unlikely to receive a fair and timely adjudication of those claims, and defendants who find themselves sued in Mississippi will not receive a fair and timely adjudication of their defenses.

B. Mass Joinders Result in Fundamentally Unfair Pre-Trial and Trial Proceedings.

When hundreds or even thousands of individual claims are joined together, there is no conceivable way that one would ever "expect[] to try them all in one judicial proceeding." *Gibbs*, 383 U.S. at 725. The sheer magnitude of these cases encourages judges to make procedural rulings that prejudice defendants' rights and call into question the court system's commitment to provide individualized justice. For example, some courts in Mississippi have strictly enforced the 90-day discovery limit of Mississippi Uniform Circuit and County Rule 4.04(A)—even in cases involving hundreds of plaintiffs. With discovery thus curtailed, it is impossible to mount an effective defense. Furthermore, trials of factually unrelated claims create a serious risk of jury confusion, particularly when the claims of plaintiffs with serious injuries are tried together with the claims of those who have relatively minor injuries. In effect these cases become

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[8] Other states—most notably Texas—have attempted to curtail filings by out-of-state plaintiffs in recent years. See *Owens Corning* v. *Carter*, 997 S.W.2d 560 (Tex.), *cert. denied*, 528 U.S. 1005 (1999) (rejecting constitutional challenge to recently enacted Texas borrowing statute in actions brought by Alabama plaintiffs whose claims were time-barred under Alabama law). Such measures will likely increase the number of plaintiffs who seek to file in Mississippi in mass joinder actions unless this Court halts such abuses.

class actions—a procedure that the Mississippi courts have not adopted, see *Marx* v. *Broom*, 632 So. 2d 1315, 1322 (Miss. 1994)—only without any of the procedural protections embodied in Fed. R. Civ. P. 23 or analogous state law provisions.

C. Mass Joinders Effectively Eliminate Defendants' Right To Appeal.

Unlike consolidated proceedings in which each case retains its individual character, *see Smith* v. *H.C. Bailey Cos.*, 477 So. 2d 224, 231 (Miss. 1985), joinder creates a single action that generally yields a single judgment. See Miss. R. Civ. P. 54(b). When multiple claims are joined together without limit, however, plaintiffs can often delay issuance of a final judgment indefinitely by repeatedly amending their complaint to add new parties. In *Cosey*, for example, plaintiffs amended their complaint eleven times, adding more than 2,500 plaintiffs to those named in the original complaint. As a result of such mass joinder, there may never be any final judgment to appeal. And even if a final judgment is reached, Miss. R. App. P. 8 requires appellants to post a 125-percent supersedeas bond to obtain a stay of execution, unless a lesser bond is approved by the trial court or this Court. When claims are aggregated in a single judgment that may be worth hundreds of millions of dollars, it may be impossible for a defendant to obtain such a bond, effectively eliminating the right to appeal.

CONCLUSION

If this Court does not take action to halt further abuses of joinder in Mississippi and in any state inclined to follow in its footsteps, the trend toward mass joinders in Mississippi and elsewhere will continue to escalate. Thousands more foreign plaintiffs will rush to Mississippi or any similar state to file every conceivable manner of mass tort claims, and the case loads in places like Jefferson County will continue to mount. Defendants will continue to be forced into participating in fundamentally

unfair proceedings, and plaintiffs with legitimate claims in the state will be forced to endure long delays when they seek justice.

For all of the foregoing reasons, this Court should grant certiorari to clarify that, as a matter of due process of law, joinder is not appropriate simply because plaintiffs allege similar injuries under the same general legal theory. Rather, courts must apply a reasonable version of the requirement that the plaintiffs' injuries must all arise out of "the same transaction, occurrence, or series of transactions or occurrences," *i.e.*, a single, closely related set of facts and circumstances. Applying this standard as it should be applied, it is clear that mass joinder was not appropriate in these cases, which arise from hundreds of different loan transactions.

Respectfully submitted,

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